No. 23A641

IN THE

Supreme Court of the United States

MICHIGAN INDEPENDENT CITIZENS REDISTRICTING COMMISSION, et al.,
Defendant-Applicant,

v.

DONALD AGEE, JR., et al.,
Plaintiffs-Respondents,

&

JOCELYN BENSON, in her official capacity as Michigan Secretary of State,
Defendant-Respondent.

Reply Brief in Support of Emergency Application for Stay and Request for an Immediate Administrative Stay

To the Honorable Brett M. Kavanaugh
Associate Justice of the Supreme Court of the United States and
Circuit Justice for the Sixth Circuit

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STATEMENT

The Commission faithfully adhered to this Court's precedents holding that the Fourteenth Amendment will be satisfied by efforts at Voting Rights Act (VRA) compliance informed by a "functional analysis" of voting patterns, *Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. 178, 195 (2017), not mechanical thresholds divorced from evidence, *Cooper v. Harris*, 581 U.S. 285, 304–06 (2017). Yet its plans still were found deficient. Under the decision below, no plan drawn predominantly to comply with §2 can pass muster. This Court's prompt intervention is necessary to prevent that outcome and provide essential guidance for redistricting authorities to navigate the "competing hazards of liability" posed by the Fourteenth Amendment and the VRA. *Abbott v. Perez*, 138 S. Ct. 2305, 2315 (2018) (citation omitted).

Respondents' defense of the decision below confirms its infirmities. The narrow-tailoring question is whether the Commission had good reasons to believe the *Gingles* preconditions were satisfied. *Cooper*, 581 U.S. at 294. But respondents admit the district court did not evaluate whether the *Gingles* preconditions were satisfied and ignored the work of the Commission's expert, Dr. Handley, which showed that they were. A court cannot apply the "good reasons . . . standard," *id.*, without examining a redistricting authority's actual reasons for its decisions. Respondents' belated efforts to supply findings the district court failed to make are both unavailing and incorrect. And their insistence that primary elections should be examined ignores that they *were* examined. Respondents identify no election data Dr. Handley failed to review and do not say what she should have inferred from the primary data prominently featured in her report. Respondents' position, in essence, is the theme of the decision below: whatever the redistricting authority did, it was wrong.

That view misses the governing legal standard, which affords "breathing room" by permitting a legislative body to show "good reasons" for its decisions and by not requiring proof "that its action was actually necessary." *Bethune-Hill*, 580 U.S. at 194–95 (quotation and alteration marks omitted). The Commission satisfied this test to a degree never before achieved. This Court is unlikely to find otherwise after a fulsome review on the merits (which is likely to occur), and it should stay the injunction below to preserve the status quo pending that review.

ARGUMENT

I. The Court Is Likely To Note Probable Jurisdiction and Reverse

The first two stay factors are satisfied. This case will likely be among the most important redistricting cases this Court will resolve this decade, and it is unlikely to affirm the injunction below.

Respondents acknowledge that "compliance with the VRA can be a compelling interest," Opp. 17, that will "justify the consideration of race in a way that would not otherwise be allowed," *Abbott*, 138 S. Ct. at 2315; *see also Bethune-Hill*, 580 U.S. at 193 (upholding challenged district where the plaintiffs did "not dispute that compliance with § 5 was a compelling interest"). Thus, respondents' extensive discussion of the district court's findings of fact in its predominance inquiry, *e.g.*, Opp. 9–10, 13–14, and their repeated observation that applicants rest their stay application only on the narrow-tailoring inquiry, *e.g.*, Opp. 10, 17, do not move the needle. The Commission's narrow-tailoring defense supplies more than a sufficient basis for this Court to note probable jurisdiction and reverse. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010); *see* Stay Appl. 19–34.

Because the district court's analysis is deficient—and because the effects of its ruling are likely to be widespread and deleterious—this Court is likely to do both. Respondents strive to paint the district court's narrow-tailoring analysis as "meticulously detailed," founded on "over 10,000 pages of record," and comprising "an unassailable factual finding." Opp. 10. But they cannot overcome the basic fact that the district court's "shorter work" of the narrow-tailoring inquiry is barely over two pages long, App. 112a–114a, and contains very little of the analysis respondents now read into it. Indeed, respondents' theories of what this case concerns—and what the court below held—are erratic. For example, they repeatedly say the district court's narrow-tailoring holding is a "factual finding," Opp. 14, but elsewhere admit the district court "did not examine Dr. Handley's polarization analysis" and say it did not need to because it rested on "a legal mistake," Opp. 26 (citation omitted); *but see* Opp. 14 ("There is no disputed legal issue at stake here"). They announce that the narrow-tailoring issue is "one the panel decisively resolved against the Commission after considering all the trial evidence," Opp. 14, but then admit the district court "did not address any of the *Gingles* preconditions or determine whether the Commission had good reasons to believe they were satisfied," Opp. 26 (quoting Stay Appl. 28). They also acknowledge that §2 may be violated if "an 'excessive majority' of Black voters are packed into a single district," Opp. 19, but later propose that "districts of more than 70% BVAP and less than 30% BVAP" would not violate the VRA "because those BVAPs reflect the natural geographic distribution of Black voters in Detroit," Opp. 26. Their arguments do not make sense and are often difficult to follow.

That is symptomatic of deeper problems. While laden with quips, respondents' brief falls short in coherence and substance and cannot make up for an ill-reasoned

lower-court ruling that will, if left undisturbed, pose significant national consequences for redistricting authorities that attempt to comply with §2.

A. The Commission Had a Strong Basis in Evidence To Conclude That §2 Required Racial Considerations

The Commission set forth its strong basis in evidence to conclude that the *Gingles* preconditions were satisfied and proved its use of race was narrowly tailored. Stay Appl. 22–27. To summarize, early draft plans contained supermajority BVAP districts (as high as 76.56% BVAP) that neighbored districts with BVAPs below 30% (and even 10%), and a polarized-voting analysis demonstrated that the former were packed and the latter were cracked. Rather than employ "a mechanically numerical view" of the VRA, the Commission tailored its efforts to bring high BVAPs down and low BVAPs up to "a functional analysis of the electoral behavior within the particular jurisdiction or election district." *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 276–77 (2015) (citation omitted). That is what this Court's precedents have directed legislative bodies to do. *See id.*; *Cooper*, 581 U.S. at 301–02; *Wisconsin Legislature v. Wisconsin Elections Comm'n*, 595 U.S. 398, 404 (2022). If that approach does not work, nothing does.

1. Respondents admit the district court ignored the proper standard. *Cooper* unanimously held that a redistricting authority will have a strong basis in evidence to use race for §2 compliance if it "has good reason to think that all the '*Gingles* preconditions' are met." 581 U.S. at 302; *see* Opp. 5 (acknowledging this standard applies). Respondents concede "it is true that the three-judge panel 'did not address any of the *Gingles* preconditions or determine whether the Commission had good reasons to believe they were satisfied.'" Opp. 26 (quoting Stay Appl. 28). That admission defeats respondents' insistence that the district court's "work was factual,

not legal, in nature." Opp. 22. Declining to apply the correct "legal standard" is a quintessential legal error. *Bethune-Hill*, 580 U.S. at 183; *see also Ayestas v. Davis*, 138 S. Ct. 1080, 1095 (2018) (vacating and remanding decision that applied incorrect legal standard); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993) (reversing because "application of these incorrect standards may have influenced [the] ultimate conclusion"). Where the parties agree to all predicates of such an error, it is close to certain that this Court will not affirm the decision below. *See Bethune-Hill*, 580 U.S. at 188–192 (vacating and remanding based on failure to apply correct standard).

Undeterred, respondents ask this Court to determine for itself that "the Commission did not reasonably believe that all the *Gingles* preconditions were met at the time the Commission was drawing maps." Opp. 14. But these positions were not decided below and are not "sufficiently developed" for this Court "to assess them." *Roberts v. Galen of Virginia, Inc.*, 525 U.S. 249, 253–54 (1999). This Court "is a court of final review and not first view," *Bethune-Hill*, 580 U.S. at 193 (quoting *Department of Transportation v. Association of American Railroads*, 575 U.S. 43, 56 (2015)), and it does "not decide in the first instance issues not decided below," *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999). Given that respondents' various assertions include fact-bound ones, Opp. 14–17, this case is not a candidate for departure from that norm. The best case scenario for respondents insofar as they rely on these positions is vacatur and remand.

2. Respondents' assertions are, in any event, unfounded, beginning with their odd view that the Commission's record did not establish the first *Gingles* precondition. *See* Opp. 14.

That precondition is established by evidence that the relevant minority group is "sufficiently large and geographically compact to constitute a majority in some reasonably configured legislative district." *Cooper*, 581 U.S. at 301 (quotation marks omitted). As the Commission explained, draft house and senate plans contained multiple supermajority BVAP districts, Stay Appl. 23–24; App. 260a, 272a–73a, that easily show the minority group can make up "more than 50 percent of the voting-age population in the relevant geographic area," *Bartlett v. Strickland*, 556 U.S. 1, 18 (2009). That is no surprise, when respondents acknowledge that "[a] near super-majority of" black Michigan residents "reside in Wayne, Oakland, and Macomb counties with the epicenter of these residents hailing from Detroit, which is 78% 'Black alone.'" Opp. 2.

Respondents are incorrect in asserting that—beyond that evidence—the Commission needed *another* "demonstration map" to meet the narrow-tailoring standard. Opp. 14. To the contrary, the Commission merely needed a "good reason to think" this precondition would be met, *Cooper*, 581 U.S. at 301–302, not any specific manifestation of evidence, *see Bush v. Vera*, 517 U.S. 952, 966 (1996) (plurality opinion) (explaining that this inquiry does "not . . . require States engaged in redistricting to compile a comprehensive administrative record" (quotation marks omitted)). Even in after-the-fact §2 litigation, the first precondition turns not on the "proposed district" itself but on whether it shows "that a geographically compact district could be drawn." *Houston v. Lafayette Cnty., Miss.*, 56 F.3d 606, 611 (5th Cir. 1995); *see also Sensley v. Albritton*, 385 F.3d 591, 596 (5th Cir. 2004). Here, the draft plans before the Commission showed that, and no additional plan bearing the label "demonstration plan" was needed.

Likewise, no authority supports respondents' contention that the Commission needed to identify precisely "how many Black majority-minority districts could be created in and around Detroit." Opp. 15. It was more than sufficient that the Commission's record showed that at least three majority-minority senate districts and eight majority-minority house districts were possible, and it was apparent that more were possible beyond that, given the supermajority BVAP levels of many draft districts. *See* App.267a–72a. Requiring more precision would "ask too much from state officials charged with the sensitive duty of reapportioning legislative districts." *Bethune-Hill*, 580 U.S. at 195. Besides, the "failure to maximize [majority-minority districts] cannot be the measure of §2, *Johnson v. De Grandy*, 512 U.S. 997, 1017 (1994), so a plan doing that would not be informative.

3. Respondents' contentions on the second *Gingles* precondition are equally flawed. *See* Opp. 15. That precondition requires evidence that black voters are "politically cohesive." *Cooper*, 581 U.S. at 302 (citation omitted). Dr. Handley's analysis showed that black voters support the same candidates in general elections at very high levels, exceeding 98% and 99% in Oakland and Wayne Counties. *See* App. 189a–94a; *see also* App. 166a ("[I]n every election contest considered at least 95% of Black voters supported the Black-preferred candidate."). Voters cannot get more cohesive than that.

In the face of that evidence, respondents offer tricks, pointing out that Dr. Handley and Mr. Adelson found an absence of cohesion in *primary* elections. Opp. 15. But that only proves why the Commission did not look to primaries in structuring Detroit-area districts. *See* Stay Appl. 31–33; *infra* § I.C. VRA §2 "requires that minorities have an equal opportunity to participate not only in primary elections but

also in general elections," *Lewis v. Alamance Cnty., N.C.*, 99 F.3d 600, 616 (4th Cir. 1996), so the cohesion in general elections provided the good reasons the Commission needed for §2 compliance.

4. The Commission also had good reasons to believe the third precondition would be met, given its evidence that—without opportunity districts—a "white majority" would "vote sufficiently as a bloc to usually defeat the minority's preferred candidate." *Cooper*, 581 U.S. at 302 (quotation and alteration marks omitted). Dr. Handley determined that black and white voters do not support the same candidates, App. 152a, and that in districts below 40% BVAP in Oakland County and 35% BVAP in Wayne County, the white voting bloc could outvote the cohesive black electorate. *See* App. 165a–68a; App. 248a–53a. That analysis accounted for "pattern[s] of white crossover voting in the area," *Cooper*, 581 U.S. at 304, in the type of "district effectiveness analysis" called for in precedent, *Covington v. North Carolina*, 316 F.R.D. 117, 169 n.46 (M.D.N.C. 2016), *aff'd*, 581 U.S. 1015 (2017). Respondents cite no case where a redistricting authority had a more thorough analysis, and we know of none.

Respondents' numerous quarrels with this analysis are incorrect and unpersuasive.

First, they are wrong in contending that Dr. Handley's analysis is "based on counties and a statewide analysis" and that she "performed *no* district-by-district analysis whatsoever." Opp. 15. Dr. Handley's analysis was as district-specific as possible, as she determined the percent needed to win *within* Wayne and Oakland Counties; she did not merely add up vote totals of the counties themselves. *See* App. 162a–69a. In this way, the analysis would show what BVAP level of specific districts in these counties would enable black voters to elect their preferred candidates—e.g.,

draft house district 1 (28.26% BVAP) would not likely perform, but draft house district 6 (65.66% BVAP) easily would perform, *see* App. 272a. It was not possible to be more precise: when Dr. Handley performed her analysis, districts had not yet been drawn. Constitutional scrutiny "has never required the States to do the impossible." *Am. Party of Texas v. White*, 415 U.S. 767, 786–87 (1974); *Dunn v. Blumstein*, 405 U.S. 330, 360 (1972) ("By requiring classifications to be tailored to their purpose, we do not secretly require the impossible."). Moreover, Dr. Handley advised commissioners to consider recompiled election analyses that *did* show electoral outcomes for each district as it was drawn, *see* App. 171a–72a, and the district court found that commissioners employed this tool, *see* App. 009–10a. It faulted that analysis, not for failing to be district specific, but for utilizing general elections–a point addressed below (§ I.C). *See* App. 009–10a.[1]

Second, respondents fault Dr. Handley for including "*no* analysis about Macomb County." Opp. 16. But the district court correctly held that she was unable to analyze voting patterns by race in Macomb County "because black voters are scarce there." App. 008a; *see also* D. Ct. Doc. 108, 5 Trial Tr. 36:16–21. Respondents again demand "the impossible." *Am. Party of Texas*, 415 U.S. at 786–87; *see also Bethune-Hill*, 580 U.S. at 195 (cautioning courts not to ask "too much").

Third, respondents insist the elections Dr. Handley analyzed did not show the third precondition because black candidates of choice typically won elections "in Oakland County" and "in Wayne County." Opp. 16. But this, again, misses the relevant

[1] Respondents contend that the recompiled-election analysis would permit "[t]he Commission [to] draw down BVAPs as low as Mr. Adelson directed, and the Bellwether Election button would always show that Black candidates of choice would prevail." Opp. 16. But the tool would not show black-preferred-candidate success below those levels, which is the key point here.

question, which is the percent BVAP that single-member districts *within* these counties required. That is what Dr. Handley calculated; she did not rely on county-wide vote totals.

Fourth, respondents appear to argue that Dr. Handley's analysis was too conservative, as it showed that black-preferred candidates would prevail in Wayne County in BVAPs as low as 35%. *See* Opp. 20. But that proves why Dr. Handley identified 35% BVAP as an appropriate lower bound in Wayne County, App. 166a. It would not have made sense to advise commissioners that even lower BVAPs would work—especially where the data showed that wins for black-preferred candidates would fall from supermajority victories in 55% BVAP districts to narrow success in 35% BVAP districts, *see* Opp. 20; App. 167a. Districts below that latter mark would not perform for black voters. Indeed, in Oakland County, black-preferred candidates would begin losing contests in 35% BVAP districts, *see* App. 168a, which is why Dr. Handley recommended a "40% BVAP" mark there, App. 166a. Even if there is room to quarrel with those conclusions, "[t]he law cannot insist that a state legislature, when redistricting, determine *precisely* what percent minority population" the VRA demands. *Bethune-Hill*, 580 U.S. at 195.

Fifth, respondents repeatedly insist that Dr. Handley's polarized voting analysis cannot make sense "because Detroit overwhelmingly elects Democrats," Opp. 20; *see also id.* at 22–23. But respondents cite no evidence in support of their assertion. All evidence refutes it. Dr. Handley's analysis showed that white voters in Wayne and Oakland Counties routinely *prefer Republicans*. Nearly 54% of white voters in Wayne County, and more than 57% in Oakland County, supported Donald Trump in 2020; about the same percentages supported the Republican senatorial candidates

that year; more than 55% of white voters in Wayne County, and nearly 60% in Oakland County, supported Trump in 2016; high percentages supported Republican senatorial candidates those years; and white voters routinely gave better than majority support to Republican candidates in down-ballot races. *See* App. 189a–94a.

Those patterns constitute the "white bloc-voting" that would become "effective" in districts drawn with BVAPs below the levels Dr. Handley identified. *Cooper*, 581 U.S. at 305–06. Notably, respondents' expert testified at trial that he does not "disagree about these numbers" and that Dr. Handley and he "are pretty much in agreement" about these estimates. D. Ct. Doc. 102, 2 Trial Tr. 72:17–73:2. Those numbers provided "a strong basis in evidence to conclude that § 2 demands . . . race-based steps." *Cooper*, 581 U.S. at 304.

B. The Commission's Use of Race Was Narrowly Tailored

As the Commission explained, its use of race was as narrowly tailored as possible under applicable practical constraints. Stay Appl. 25–27. It considered factors like "white crossover voting," minority cohesion, and turnout rates to determine whether a proposed district will "allow the minority group to elect its favored candidates." *Cooper*, 581 U.S. at 304–05. That is the "functional analysis" this Court's precedents command. *Bethune-Hill*, 580 U.S. at 195. Respondents do not meaningfully address this Court's narrow-tailoring precedents, and their arguments predictably miss the mark.

1. Echoing the district court, respondents contend that "only an 'excessive majority' of Black voters can amount to packing under the VRA." Opp. 18. But elsewhere in their brief, they answer their own objection, admitting "that, 'without the use of race, the plans would likely have contained districts of more than 70% BVAP

and less than 30% BVAP.'" Opp. 26 (quoting Stay Appl. 29). Precisely. Districts of 70% BVAP—well above the level black voters required to elect their preferred candidates—and those below 30% and even 10%—well below that level—are packed and cracked districts. Stay Appl. 21–25. Respondents agree that *those* types of packed and cracked districts were before the Commission, and *that* is why the Commission had good reasons to avoid §2 liability. Notably, the Commission demonstrated that draft plans contained cracked districts, not just packed districts. Stay Appl. 26. Respondents (like the district court) do not address those districts.

Respondents erroneously defend the draft districts on the ground that "those BVAPs reflect the natural geographic distribution of Black voters in Detroit" and propose "[t]hat's not a VRA violation." Opp. 26. That error misses the entire point of the "effects" test of §2, which "turns on the presence of discriminatory effects, not discriminatory intent." *Allen v. Milligan*, 599 U.S. 1, 25 (2023). The effects test "prevent[s] the cracking or packing—whether intentional or not—of large and geographically compact minority populations." *Id.* at 44 (Kavanaugh, J., concurring). If the *Gingles* preconditions are satisfied, and liability is shown under the totality of circumstances, §2 prohibits "the dispersal of blacks into districts in which they constitute an ineffective minority of voters" and "the concentration of blacks into districts where they constitute an excessive majority." *Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986). There is no §2 defense if the cracking or packing is somehow "natural." Opp. 26. If there were, §2's commands would not mean much.

2. Respondents also argue that the §2 "remedy" for "packing" is "*more* districts with BVAPs *above 50%*," which they say precludes the Commission's approach of drawing districts below 50% BVAP. Opp. 18. This repeats the precise "legal

mistake" unanimously condemned in *Cooper*: that "whenever a legislature *can* draw a majority-minority district, it *must* do so—even if a crossover district would also allow the minority group to elect its favored candidates." 581 U.S. at 305. While respondents are correct that a "remedy" was necessary to cure the draft plans' cracking and packing, Opp. 18, they mistakenly ignore that §2 can be "*satisfied by* crossover districts," *Cooper*, 581 U.S. at 305. That was the narrowly tailored remedy here.

Respondents' discussion of the *Milligan* litigation exposes their confusion for what it is. Respondents correctly note that the *Milligan* plaintiffs satisfied the first *Gingles* precondition by showing that "*two* reasonably configured *majority*-minority districts" were possible. Opp. 18. But they mistakenly propose that "[n]o court suggested that the appropriate remedy was" a district "below 50%." Opp. 18–19. But that, in fact, was the outcome. The district court adopted a remedial district that "is not majority-Black; the Black voting-age population is 48.7%." *Singleton v. Allen*, No. 2:21-cv-1291-AMM, 2023 WL 6567895, at *16 (N.D. Ala. Oct. 5, 2023). That result tracks *Cooper*, which explained that the majority-minority rule applies to "the first *Gingles* precondition," but it does not follow that only a majority-minority district may remedy a §2 violation where that precondition (and others) are met; rather §2 can be "*satisfied by* crossover districts (for groups in fact meeting *Gingles*' size condition)." 581 U.S. at 305. Thus, in *Milligan*, the plaintiffs had to meet the size condition to show liability, but a 48.7% BVAP district could (and did) provide the remedy.

As relevant here, the narrow-tailoring question directs redistricting authorities to look, not to the rigid 50% BVAP target respondents propose, but to "a functional analysis of the electoral behavior within the particular jurisdiction or election district," *Alabama Legislative Black Caucus*, 575 U.S. at 276, that considers whether

"a substantial bloc of black voters, if receiving help from some white ones, could elect the candidates of their choice" at less than a majority, *Cooper*, 581 U.S. at 305. In many cases, that may show that districts at, or even above, 50% BVAP are necessary, but the evidence did not support such a conclusion here. In opposing the Commission's determination, respondents ignore practically everything this Court has said in recent years about narrow tailoring.

C. The Commission Properly Declined To Draw Districts Based on Primary-Election Information

The Commission's stay application established two points about primary elections beyond serious dispute: (1) Dr. Handley and Mr. Adelson carefully examined primary elections and (2) they found that primary elections did not show likely §2 liability and so did not form a proper basis for line-drawing in any material respect. Stay Appl. 31–32. Like the district court, respondents do not address what the evidence showed about primary elections or what the Commission's advisors found. Failing to understand any of this, respondents have nothing persuasive to say about it.

1. Respondents conflate two distinct concepts: a "failure to consider" primary elections, on the one hand, and a failure to arrive at a given conclusion, on the other. *See, e.g.*, Opp. 22; Opp. 23. As to the former, it is obviously not true that Dr. Handley did not "consider the ability of Black candidates of choice to succeed at the primary level." Opp. 22. Dr. Handley's report contains extensive primary analysis, *see* App. 156a–57a; App. 170a–71A, and she testified about that analysis at trial, App. 287a–288a (4 Trial Tr. 226:5–227:4). Those facts are inescapable and in hard print. As to the latter, however, Dr. Handley did not arrive at the conclusion respondents would prefer for reasons she explained: her analysis did not uncover a barrier to black electoral opportunity in primary elections because "half of these contests are not

polarized" and "the black preferred candidate was winning in . . . many of the contests that were polarized." App. 287a. That finding is supported in her report, which shows that the two *Gingles* polarized-voting preconditions were satisfied in only four contests in the relevant area (in about 35 examined elections), and two of those losses occurred in districts below 30% BVAP. *See* App. 155a–57a.[2] It is for that reason that the general elections—where likely §2 vulnerabilities were apparent, and the barrier to black opportunity identified—informed the line-drawing, rather than primaries.

Respondents do not address Dr. Handley's analysis in terms of data or rationale, and the district court did not either. Respondents acknowledge "that the three-judge panel 'did not examine Dr. Handley's polarization analysis,'" Opp. 26 (quoting Stay Appl. 29), and a paradigmatic case of clear error occurs where a district court "ignored the evidence" before it. *Georgia v. Ashcroft*, 539 U.S. 461, 486 (2003). It is not possible to evaluate a state's "good reasons" for its §2-compliance approach, *Cooper*, 581 U.S. at 301, by refusing to even acknowledge what those reasons are. As noted, respondents' expert testified to his "agreement" about Dr. Handley's estimates, D. Ct. Doc. 102, 2 Trial Tr. 72:17–73:2, so any "factual" finding on this point, Opp. 22, would need to depend on some error of methodology or interpretation. Respondents offer none.[3]

Instead, respondents check off evidence establishing "the importance of examining primary elections," including in Dr. Handley's academic work, Opp. 23, her

[2] The two polarized voting preconditions (black cohesion and white bloc voting) are satisfied where Dr. Handley provided the designation "polarized–lost."

[3] Respondents direct their only discussion of primary results to 2022 contests, *after* the Commission's work was complete. *See* Opp. 21–22. But they admit the analysis must be "based on the record before the Commission at the time of redistricting." Opp. 14. Post-redistricting information is properly directed to respondents' §2 claims, not their equal-protection claims. *See infra* § I.C.2.

expert testimony, Opp. 23–24, and Mr. Adelson's advice to the Commission, Opp. 30. All these citations show is a widespread (and correct) agreement that primary elections should be *examined*. But it does not follow that any precise meaning must be extracted from them regardless of what that examination uncovers. A functional analysis is not an exercise in confirmation bias. And there is certainly no reason to conclude that, where primary election results demonstrate no §2 vulnerability, but general-election results *do* demonstrate a §2 vulnerability, the primary results should inform the process.

Respondents also attempt to brush off Dr. Handley's analysis of primaries, pointing out that Dr. Handley's report containing primary election data was delivered on the date commissioners voted to adopt the final plan and suggesting these data were somehow not considered. Opp. 6. But the information was in the Commission's record when it adopted final plans, respondents concede it was "possible Mr. Adelson talked about it with Commissioners before then," Opp. 6, and Mr. Adelson testified to "significant conversations and exchanges of information" before December 28, D. Ct. Doc. 106, 4 Trial Tr. 96:24–97:10. Moreover, Dr. Handley's more extensive primary analysis in her December 28 report corroborated her prior findings and analysis, as it showed there was no need to do anything differently based on primary results.

2. Respondents' arguments about primary elections are presented in the wrong posture. *See* Stay Appl. 31. "The question is whether the State had good reasons to believe" its efforts were "necessary to avoid liability," and this standard "does not require the State to show that its action was actually necessary." *Bethune-Hill*, 580 U.S. at 194–95 (quotation and alteration marks omitted). It is a standard of

"breathing room." *Id.* at 196. That is because a racial-gerrymandering claim is "'analytically distinct' from a vote dilution claim" and considers whether racial measures were used and, if so, whether they were "justified," not whether a redistricting plan has the effect of diluting votes. *Miller v. Johnson*, 515 U.S. 900, 911 (1995). The narrow-tailoring inquiry is not a proper vehicle for challengers to demand that states disprove anything and everything that might be asserted related to §2 compliance. The redistricting authority must have good reasons for what it actually did and need not disprove every argued basis for alternative choices.

To be sure, this does not leave voters who believe their districts' BVAPs are "shockingly low" without recourse. Opp. 1. Even if a redistricting authority has good reasons to justify its decision, a choice that turns out in hindsight to be erroneous can be challenged under §2 itself, where the burden is properly on the challenger to show the *Gingles* preconditions and establish vote dilution under the totality of circumstances. *See Abbott*, 138 S. Ct. at 2331. Respondents had the opportunity to prove their §2 claims, and the arguments they tender here, *see, e.g.*, Opp. 21–22, but the district court did not resolve them. While the Commission contests §2 liability and submits respondents are not likely to succeed—precisely because the Commission did its proverbial homework on the front end—it respects the opportunity of challengers to make out their best case.

That is the proper posture for, among other things, respondents' contentions that the effect of the Hickory and Linden plans will be to reduce the size of the Michigan Legislative Black Caucus so that it "could fit into the backseat of an Uber XL." Opp. 22. For present purposes, it is sufficient to note that Michigan's Black Caucus did not lose membership. *See* D. Ct. Doc. 76 at 25–26. Indeed, Michigan elected its

first black house speaker under the Hickory plan. In a recent interview, the newly elected speaker explained: "I'm the first Black Speaker in Michigan's history, and part of that—you could argue—was because the lines were drawn by an independent redistricting commission versus a partisan legislature," which he asserted is "something that should be taken into account."[4]

D. Respondents' Remaining Positions Lack Merit

Several of respondents' other positions implicitly or explicitly warrant a response.

First, respondents imply that the Commission should have maintained high-BVAP districts because plans from the 1990s and 2010 redistricting cycles contained them. *See, e.g.*, Opp. 2–3. "But this Court has never held that a State's adherence to a previously used districting plan can defeat a § 2 claim." *Milligan*, 599 U.S. at 22. Moreover, to satisfy constitutional scrutiny, the Commission's VRA efforts had to be "justified by current needs," *Shelby Cnty., Ala. v. Holder*, 570 U.S. 529, 550 (2013), not former needs. Past plans provided no defense to any plausible claim.

In fact, the Virginia legislative districts invalidated last decade, *see Bethune-Hill v. Virginia State Bd. of Elections*, 326 F. Supp. 3d 128 (E.D. Va. 2018) (three-judge court), were carried forward from a prior decade's plan that survived a racial-gerrymandering challenge, *see Wilkins v. West*, 571 S.E.2d 100, 111–18 (Va. 2002). When the state proffered an expert report from that litigation as justifying its maintenance of majority-minority districts, the three-judge federal court rejected it, holding that "the underlying data was based on electoral results from the 1990s and thus was

[4] Hernz Laguerre, *MichMash: Michigan House Speaker Joe Tate on redistricting, 2024 agenda*, WDET (Jan. 12, 2024), at https://wdet.org/2024/01/12/michigan-house-speaker-joe-tate-on-redistricting-2024-agenda/ (visited Jan. 17, 2024).

outdated for purposes of the 2011 redistricting." *Bethune*, 326 F. Supp. 3d at 179 n.61. The court explained that, without current evidence justifying their choices, "legislatures could pack black voters into majority-minority districts in perpetuity, claiming ignorance of the fact that high BVAP concentrations were not necessary to comply with" the VRA. *Id.* at 180.

Second, respondents suggest the Commission should have heeded "public comments regarding the need for higher BVAPs in the Detroit districts." Opp. 7. But this Court rejected a similar argument in *Abbott*, where Texas created a majority-minority district because advocates "demanded as much." 138 S. Ct. at 2334. The Court found that such "demands alone cannot be enough" because "[a] group that wants a State to create a district with a particular design may come to have an overly expansive understanding of what § 2 demands." *Id.* Likewise, in this case, the Commission was presented with advocacy for higher BVAPs, but no evidence or analysis supporting that advocacy.

Third, respondents close their brief with a law review article by Jocelyn Benson (who is now Michigan's Secretary of State but was not when she authored the article) advocating for majority-minority districts, even proposing "a ban on reductions below 55%" minority voting-age population. Opp. 38 (citation omitted). But the article was criticizing this Court's majority decision in *Georgia v. Ashcroft*, which granted states leeway "to choose to create a certain number of 'safe' districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice" or "to create a greater number of [crossover] districts in which it is likely—although perhaps not quite as likely as under the benchmark plan—that minority voters will be able to elect candidates of their choice." 539 U.S. at 480. This Court repeated that

position and applied it to VRA §2 in *Bartlett*. *See* 556 U.S. at 23 (plurality opinion). Respondents do not address these (or most other) precedents of this Court speaking to the issues in this case. Their recourse to a law review article disagreeing with this Court's precedents is powerful evidence that their position reflects what they want the law to be, not what it is.

Finally, if there was any doubt of that, respondents erased it in a filing in the district court made after the stay application was filed. The district court announced its intention to appoint Dr. Bernard Grofman as one of two special masters for the remedial phase below, and respondents objected on the ground that Dr. Grofman's "redistricting theory" conflicts with the district court's opinion. D. Ct. Doc. 159 at 5; *see also id.* at 6 (asserting that Dr. Grofman shares "the same views" as those the district court rejected). That is quite an admission. Dr. Grofman was the plaintiffs' expert in *Thornburg v. Gingles*, 478 U.S. 30, 52 (1986), has been called "one of the world's leading experts in the study of redistricting and voting rights," *Wright v. Sumter Cnty. Bd. of Elections & Registration*, 979 F.3d 1282, 1299 (11th Cir. 2020) (Marcus, J., for the court), has been the special master in numerous remedial processes after plans were invalidated on equal-protection and VRA grounds, *see, e.g.*, *id.* at 1299–1300; *Navajo Nation v. San Juan Cnty.*, 929 F.3d 1270, 1290–91 (10th Cir. 2019); *Bethune-Hill v. Virginia State Bd. of Elections*, 368 F. Supp. 3d 872 (E.D. Va. 2019) (three-judge court); *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 556 (E.D. Va. 2016) (three-judge court), and has authored various articles cited favorably by this Court, *see Johnson*, 512 U.S. at 1020 (favorably citing B. Grofman, L. Handley, & R. Niemi, *Minority Representation and the Quest for Voting Equality* 136 (1992)); *Shaw v. Hunt*, 517 U.S. 899, 912 (1996) (*Shaw II*) (favorably citing B. Grofman & C.

Davidson, *Controversies in Minority Voting* 56 (1992)); *Miller*, 515 U.S. at 924 (same); *Georgia*, 539 U.S. at 483 (2003) (favorably citing Grofman, Handley, & Lublin, *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C.L.Rev. 1383 (2001)); *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 798 (2015) (favorably citing Miller & Grofman, *Redistricting Commissions in the Western United States*, 3 U.C. Irvine L. Rev. 637, 661, 663–664, 666 (2013)). Respondents' belief that the "philosophy" of the nation's preeminent VRA expert conflicts with the district court's opinion, D. Ct. Doc. 159 at 2, may be the best evidence that the district court's decision is wrong.

This Court is likely to give this case fulsome review and conclude as much. The first two stay factors are satisfied.

II. The Equitable Factors Favor a Stay

The Commission's stay application demonstrates multiple forms of irreparable harm that will manifest without a stay, and that any balancing of considerations favors a stay. Respondents say comparatively little about these factors, and what they do say lacks probative force.

1. In contending that the Commission "is not irreparably harmed by being required to draw a race-neutral, constitutionally compliant map," Opp. 34, respondents do not address this Court's repeated holding that "the [State's] inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State." *Abbott*, 138 S. Ct. at 2324, n.17; *see also Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers). Nor do they address precedent holding that a requirement to "adopt an alternative redistricting plan" by a date certain (before an appeal will be decided) constitutes "irreparable harm." *Karcher v. Daggett*, 455 U.S. 1303, 1306

(1982) (Brennan, J., in chambers). And their argument does not speak to the irreparable-harm standard because it improperly assumes the Commission's house and senate plans are not "constitutionally compliant." Opp. 34. The point of the irreparable-harm inquiry is not to double count the inquiry into likelihood of success, but to determine whether "irreparable harm is likely to result from the denial of a stay" in the event that the appellant "eventually succeed[s] on the merits." *Rostker v. Goldberg*, 448 U.S. 1306, 1310 (1980) (Brennan, J., in chambers). Because the Commission has shown a likelihood of prosecuting this case to full briefing and argument in this Court, and a fair prospect of winning at that stage, the likelihood that it will lose much of the benefit of an ultimate ruling in its favor without a stay amounts to irreparable harm.

Those harms are uniquely severe here in ways the Commission demonstrated. Stay Appl. 35–39. Respondents' curt retorts, Opp. 34–35, are wholly inadequate to that showing. Respondents' §2 claims are not resolved, even though federal courts ordinarily must resolve statutory claims before constitutional ones, Lyng *v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 446 (1988); *see League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 442 (2006); *Gingles*, 478 U.S. at 38, and this leaves the Commission with little idea of how to configure Detroit-area districts. Respondents' repetition of the district court's quip—"stop using the VRA as a proxy for race," Opp. 35—cannot be reconciled with their objection to any Detroit-area district with "shockingly low" BVAPs. Opp. 1. Respondents' arguments about "election deadlines," Opp. 37, stand rebutted in the brief of Respondent Secretary of State, who raises profound concerns about "how well the changes can be made in the condensed timeframe" before 2024 house elections. Sec. of State Br. 19. The concerns of the

State's chief election administrator are more probative than respondents' unsupported statements.

Meanwhile, respondents' assertions that the district court has *power* "to move forward" and override state-law requirements, Opp. 34, misses that the irreparable-harm inquiry does not turn on power, but on equitable discretion. Federal supremacy does empower federal courts to make alterations to state law in some instances to vindicate federal rights and interests. But those alterations amount to irreparable harm all the same. As just one example, Michigan's Constitution directs the Commission to post proposed plans for a 45-day notice-and-comment period to solicit public input, Mich. Const. art. IV, § 6(14)(b), but the district court ordered the Commission to conduct a 21-day notice-and-comment period, D. Ct. Doc. 156 at 5. While its power to do that is not disputed below, it irreparably harms compelling state interests in maximizing public input all the same. Respondents' admission that the district court is aggressively intervening in state affairs only proves this stay element is satisfied.

2. Respondents' contentions that a stay will irreparably harm them ignore that, even if they made such a showing, it would not defeat this application. "In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth*, 558 U.S. at 190. Even assuming this case qualifies as close, respondents' arguments place them in a posture no different from any other plaintiff in past redistricting cases where this Court granted stays. One example is *Miller v. Johnson*, 512 U.S. 1283 (1994), where this Court granted a stay pending appeal, even though the district court found that "race was *the overriding, predominant force* determining the lines of the [challenged] district." *Johnson v. Miller*, 864 F. Supp. 1354, 1372 (S.D. Ga. 1994); *see id.* at 1374–93.

Respondents' position here is comparatively weak. They assert a stay would "force Detroit's Black voters to be further disenfranchised," Opp. 35, but, as noted, the equal-protection claim that was resolved entails no determination of vote dilution or denial. Respondents' claims to that effect are unresolved and would not be harmed by a stay pending appeal.

CONCLUSION

The Court should grant the application and issue a stay of the district court's injunction and remedial proceeding pending applicants' forthcoming appeal to this Court. The Court should also issue a prompt administrative stay pending resolution of this application. The Court would, in addition, be justified in construing this application as a jurisdictional statement, noting probable jurisdiction, and conducting prompt oral argument.

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Respectfully Submitted,

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